

1 PILLSBURY WINTHROP SHAW PITTMAN LLP  
2 REYNOLD L. SIEMENS #177956  
3 Email: reynold.siemens@pillsburylaw.com  
4 725 South Figueroa Street, Suite 2800  
5 Los Angeles, CA 90017-5406  
6 Telephone: (213) 488-7100  
7 Facsimile: (213) 629-1033

8 PILLSBURY WINTHROP SHAW PITTMAN LLP  
9 BRUCE A. ERICSON #76342  
10 Email: bruce.ericson@pillsburylaw.com  
11 GEORGE ALLEN BRANDT #264935  
12 Email: allen.brandt@pillsburylaw.com  
13 50 Fremont Street  
14 Post Office Box 7880  
15 San Francisco, CA 94120-7880  
16 Telephone: (415) 983-1000  
17 Facsimile: (415) 983-1200

18 Attorneys for Defendants ROBERT JOHN BURRELL, WILLIAM CHENEY,  
19 GORDON DAMES, ROBERT H. HARVEY, JR., JAMES JORDAN,  
20 TIMOTHY M. KRAMER, ROBIN LENTZ, JOHN M. MERLO, WARREN  
21 NAKAMURA, BRIAN OSBERG, DAVID RHAMY and SHARON UPDIKE

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 WESTERN DIVISION

15  
16 NATIONAL CREDIT UNION  
17 ADMINISTRATION BOARD AS  
18 CONSERVATOR FOR WESTERN  
19 CORPORATE FEDERAL CREDIT  
20 UNION,  
21 Plaintiff,  
22 vs.  
23

24 ROBERT A. SIRAVO, et al.,  
25 Defendants.  
26  
27  
28

29 No. CV 10-01597 GW (MANx)

30  
31 **MEMORANDUM IN SUPPORT OF**  
32 **DEFENDANTS' MOTION TO**  
33 **SUBSTITUTE PLAINTIFF**  
34 **PURSUANT TO FED. R. CIV. P. 25(c)**

35 Honorable George H. Wu  
36 Courtroom 10  
37 312 North Spring Street

38 Date: June 9, 2011  
39 Time: 8:30 a.m.  
40 Courtroom: Los Angeles, 10

41 Filed herewith:  
42 1. Notice of Motion and Motion

1    **I. INTRODUCTION.**

2            The National Credit Union Administration (“NCUA”) filed its First  
3    Amended Complaint, Doc. 84 (the “FAC”) in its capacity as *conservator* of  
4    Western Corporate Federal Credit Union (“WesCorp”). When NCUA filed the  
5    Second Amended Complaint, Doc. 116 (the “SAC”), however, it purported to do  
6    so in its capacity as *liquidating agent* of WesCorp. The NCUA accordingly  
7    claims that the interest in the litigation has transferred from the NCUA-  
8    Conservator to the NCUA-Liquidating Agent. SAC ¶ 1.

9            Before filing the SAC, the NCUA sought a stipulation to the substitution,  
10   and a number of drafts of such a stipulation were exchanged among counsel.  
11   Ultimately, however, discussions foundered over the NCUA’s refusal to include  
12   in a written stipulation a condition that the removal from the case of NCUA-  
13   Conservator would not bar defendants from filing counterclaims or cross-claims  
14   or other claims in this Court asserting misconduct by WesCorp or NCUA-  
15   Conservator, and would not require defendants to bring such claims elsewhere  
16   (e.g., the Eastern District of Virginia, where the NCUA is headquartered).

17           Although no agreement was reached on the form of a written stipulation,  
18   and although counsel brought to the NCUA’s attention Rule 25(c), the NCUA  
19   filed the SAC in the name of NCUA-Liquidating Agent and omitted NCUA-  
20   Conservator without seeking court approval of the substitution, as required by  
21   Rule 25(c). Hence the defendants listed on the cover page and in the notice of  
22   motion and motion (“Defendants”) make this motion.

23   **II. ARGUMENT.**

24   **A. The NCUA has not complied with Rule 25(c).**

25           The NCUA’s failure to seek a court order for substitution violates the plain  
26   language of Rule 25(c). The relevant portion of Rule 25(c) provides as follows:

27           If an interest is transferred, the action may be continued by or  
28   against the original party ***unless the court, on motion, orders the***

1           ***transferee to be substituted*** in the action or joined with the original  
2           party.

3           Fed. R. Civ. P. 25(c) (emphasis added). The language of the rule provides for  
4           two possibilities at the time of transfer: either the action continues by the  
5           original party or the court orders the transferee to be substituted. The NCUA has  
6           violated the rule by unilaterally substituting itself without a court order. *See*  
7           *International Rediscount Corp. v. Hartford Acc. & Indem. Co.*, 425 F. Supp. 669,  
8           674 (D. Del. 1977) (“[I]n the absence of a motion for substitution and an order of  
9           the Court, the action will be continued in the name of the original party to the  
10           suit, the successor in interest being bound by any judgment resulting from the  
11           litigation.”).

12           The decision whether to substitute a new plaintiff for the old is within the  
13           discretion of the court. When presented with a motion under Rule 25(c), the  
14           court has three options: keep the original party, substitute the new party, or join  
15           the new party with the original party. *Educational Credit Mgmt. Corp. v. Bernal*,  
16           207 F.3d 595, 598 (9th Cir. 2000); *Hilbrands v. Far East Trading Co.*, 509 F.2d  
17           1321, 1323 (9th Cir. 1975). By acting without the motion and order required by  
18           the rule, the NCUA has improperly deprived this Court of its discretion over this  
19           matter.

20           This is no mere quibble over a nicety of civil procedure, but might harm  
21           Defendants. The NCUA plays a number of different roles, and those roles can  
22           impact litigation. While there is not much precedent as to the NCUA, the  
23           Federal Deposit Insurance Corporation (“FDIC”) plays similar roles, and the  
24           Ninth Circuit has recognized that separating the roles is necessary to distinguish  
25           between the rights and responsibilities of various entities. *See, e.g., FDIC v.*  
26           *Glickman*, 450 F.2d 416, 418 (9th Cir. 1971) (“[A] distinction must be drawn  
27           between FDIC’s dual capacity as federal insurer of deposits and as liquidating  
28           agent for the bank.”); *First Nat’l Ins. Co. of Am. v. FDIC*, 977 F. Supp. 1060

1 (S.D. Cal. 1997) (refusing to hold FDIC-corporate responsible for acts of FDIC-  
2 receiver). Thus, it is not impossible that NCUA-Liquidating Agent, if allowed to  
3 replace NCUA-Conservator, could argue that it is not responsible for the alleged  
4 misdeeds of NCUA-Conservator or WesCorp (which include, among others,  
5 canceling the Defendants' D&O insurance and denying them indemnification).  
6 Given the transfer of interest between the NCUA in its various roles, the NCUA  
7 should have sought a court order for the substitution it has attempted to achieve  
8 through self-help.

9 At first blush, it might seem odd for Defendants to seek an order  
10 substituting plaintiffs, but it is procedurally proper for a defendant to request a  
11 court order substituting a plaintiff under Rule 25(c). Any party can make the  
12 motion to substitute another party under Rule 25(c). *See Montecatini Societa  
13 Generale Per L'Industria Mineraria e Chimica v. Humble Oil & Refining Co.*,  
14 261 F. Supp. 587, 591 (D. Md. 1966). And given the NCUA's refusal to abide  
15 by Rule 25(c), Defendants have little option but to raise the matter themselves.  
16 **B. NCUA-Conservator should not be permitted to withdraw, or NCUA-  
17 Liquidating Agent to take its place, without conditions protecting  
18 Defendants' interests.**

19 As noted above, Defendants believe they have meritorious counterclaims  
20 or cross-claims against NCUA-Conservator or WesCorp or both based (inter  
21 alia) on NCUA-Corporate's cancellation of their D&O insurance and WesCorp's  
22 refusal (on bogus grounds) to honor their indemnification agreement.  
23 Defendants are concerned that if NCUA-Conservator is let out of this case,  
24 Defendants might be deemed unable to raise those claims in this Court, at least  
25 not without third-party practice.

26 Defendants therefore respectfully request that if the Court permits the  
27 substitution of NCUA-Liquidating Agent as plaintiff in place and in lieu of  
28 NCUA-Conservator, the order provide that the substitution does not affect in any

1 way whatever rights Defendants may have to assert in this Court claims or  
2 counterclaims or cross-claims (pursuant to Fed. R. Civ. P. 13 and 14, or  
3 otherwise) against WesCorp or against NCUA-Conservator.

4 Defendants were prepared before to resolve this matter by stipulation, and  
5 they remain willing to do so, if only the NCUA will agree in writing to this  
6 condition.

7 Dated: April 18, 2011.

8 PILLSBURY WINTHROP SHAW PITTMAN LLP  
9 REYNOLD L. SIEMENS #177956  
10 Email: reynold.siemens@pillsburylaw.com  
11 725 South Figueroa Street, Suite 2800  
12 Los Angeles, CA 90017-5406  
13 Telephone: (213) 488-7100  
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18 GEORGE ALLEN BRANDT #264935  
19 Email: allen.brandt@pillsburylaw.com  
20 50 Fremont Street  
21 Post Office Box 7880  
22 San Francisco, CA 94120-7880  
23 Telephone: (415) 983-1000  
24 Facsimile: (415) 983-1200

25 By /s/ Bruce A. Ericson  
26 Bruce A. Ericson

27 Attorneys for Defendants Robert John Burrell, William  
28 Cheney, Gordon Dames, Robert H. Harvey, Jr., James  
Jordan, Timothy M. Kramer, Robin Lentz, John M. Merlo,  
Warren Nakamura, Brian Osberg, David Rhamy and  
Sharon Updike